STATE OF MICHIGAN

COURT OF APPEALS

MARGARET PRIDE, BRENDA BALOGUN, Next Friend of ADEMOLA BALOGUN, Minor, and KIM RENEE PRIDE, Next Friend of AMBER FLETCHER, Minor,

Plaintiffs-Appellants,

v

LINDA G. COLEY,

Defendant,

and

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
December 21, 2001

No. 225411
Wayne Circuit Court
LC No. 98-830747-NI

Before: Meter, P.J., and Jansen and Gotham*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Pride was driving a car in which the two children were passengers. She and defendant Coley were involved in an accident at the intersection of Clairmont and the Lodge service drive. Both drivers claimed that they had a green light. Plaintiffs claimed that the light was malfunctioning and sought to hold the city liable under the highway exception to governmental immunity. MCL 691.1402. The trial court ruled that plaintiffs had failed to show that the defect had existed for a sufficient period of time such that defendant should have known about it and been able to repair it.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis,* 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion premised on immunity granted by law is properly considered under MCR 2.116(C)(7). "This Court reviews

* Circuit judge, sitting on the Court of Appeals by assignment.

the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Each governmental agency having jurisdiction over a highway is required to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). Before the city can be held liable, however, it must have notice of the defect:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of thirty days or longer before the injury took place. [MCL 691.1403.]

The burden of proof is on the plaintiff to show that the defendant knew or should have known of the defective condition and had a reasonable time to repair it. *VanStrien v Grand Rapids*, 200 Mich App 56, 58; 504 NW2d 13 (1993). Notice can be shown in one of three ways: "(1) actual notice; (2) existence of the defect for over thirty days, which establishes a conclusive presumption of notice; or (3) evidence showing that the agency should have discovered and repaired the defect in the exercise of reasonable diligence, i.e., constructive notice." *Peterson v Dep't of Transportation*, 154 Mich App 790, 795; 399 NW2d 414 (1986).

Plaintiffs did not have any evidence that the city had actual notice of any defect prior to the accident in question. They attempted to prove constructive notice by showing that the traffic light at the intersection had been malfunctioning for over a year. However, the only evidence offered was the police officers' testimony about what they were told by drivers involved in previous accidents.

The police officers' testimony is hearsay because it consists of statements of third persons who were not testifying that were offered to prove the truth of the matter asserted. MRE 801(c). "Hearsay evidence is not admissible at trial unless it falls within an established exception" to the hearsay rule. *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992). Plaintiffs, as the proponents of the evidence, bear the burden of establishing the foundational elements of the hearsay exceptions upon which they rely. *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 319; 333 NW2d 264 (1983).

Plaintiffs offered the evidence under MRE 803(1), which excludes from the definition of hearsay a present sense impression, i.e., a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Plaintiffs offered no evidence to show when the other drivers made the statements such that one could conclude that the statements were made while they were viewing the event or so soon thereafter that they could be considered substantially contemporaneous with the event. *People v Hendrickson*, 459 Mich 229, 236, 242; 586 NW2d 906 (1998). Therefore, plaintiffs

failed to prove that the officers' testimony of the other drivers' statements was admissible under MRE 803(1).

Plaintiffs also offered the evidence under MRE 803(2), which excludes from the definition of hearsay an excited utterance, i.e., a statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. Again, plaintiffs offered no evidence as to the circumstances under which the other drivers made the statements or whether their actions and demeanors suggested that they were excited or under nervous stress. Absent such evidence, "we cannot conclude that the statements in question fell within the excited utterance exception." *Hewitt, supra* at 319.

Plaintiffs also attempted to prove constructive notice of the existing malfunction through the testimony of the investigating officer, who stated that various witnesses told him that there had been "problems" with the light that had existed "for a period of time." Plaintiffs assert without discussion that such testimony was admissible under MRE 803(1) or (2). Because a party may not simply announce a position and leave it to the Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), the issue is deemed abandoned and we need not consider it. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Because plaintiffs offered no admissible evidence to show that the traffic light was malfunctioning prior to the accident at issue and that the defect existed for such a time that constructive notice to defendant could be inferred if not conclusively presumed, the trial court did not err in granting defendant's motion.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Roy D. Gotham